Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 19

No. 75-925

PAUL A. WOOD AND WOODMONT CANTON APT. CORP.

Petitioners

— VS —

EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, CINCINNATI, OHIO

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I

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PAUL A. WOOD AND WOODMONT CANTON APT. CORP.

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EQUITABLE LIFE ASSURANCE SOCIETY
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PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT, CINCINNATI, OHIO

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by Paul A. Wood for Writ of Certiorari to review a Judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above case.

* Wherever the word petitioner is found, it shall mean petitioners.

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II. JURISDICTIONAL STATEMENT

The date of the Judgment sought to be reviewed is October 3, 1975. The statutory provision believed to confer on this Court jurisdiction to review the Judgment in question is Section 1254 of Title 28 of the United States Code. (Appeal allowed within ninety (90) days.)

III. QUESTIONS PRESENTED

(A) It is unlawful for a financial institution to withhold payments of construction money of a building to accommodate the Union to drive a builder out of the State;

(B) The doctrine of Res Judicata does not apply to a third person who was not a party to the original case;

(C) The mere ownership of a stock in a Ohio corporation does not bind such owner to a judgment against the corporation;

(D) The Constitution of the State of Ohio prohibits the doctrine of privity between a stockholder and his corporation;

(E) Either party to a settlement agreement may bring a lawsuit to enforce the terms of the settlement agreement;

(F) A party to a written contract cannot affirm it for one purpose and disclaim it for another.

IV. SECTIONS OF THE CONSTITUTION INVOLVED

The sections of the United States Constitution and the Constitution of the State of Ohio violated are:

(A) U. S. Constitution Article IV Section 2

"Full faith and credit shall be given in each State to the

public acts . . . of every other State."

(B) United States Constitution, Article I, Section 10

"No state shall . . . has an ex post facto law, or law impairing the obligation of contracts."

(C) United States Constitution, Article I, Section 9

"No bill of attainer or ex post facto laws shall be passed."

(D) Constitution of the State of Ohio, Article II, Section 28

"The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contract."

(E) The Constitution of the State of Ohio, Article XIII, Section 3

" . . . In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her . . ."

(F) The lower courts violated all the cases expounding the above articles.

V. STATEMENT OF THE CASE

(1) For convenience, we will use the following abbreviations:

Mr. Wood for Paul A. Wood
Woodmont for Woodmont Apartments of Canton, Inc.
Equitable for Equitable Life Assurance Society of the United States.

(2) Equitable was a party to six separate written contracts:

First: Between Equitable and Woodmont Corporation, a mortgage loan including construction money payable in installments as the building progressed;

Second: Between Equitable and Mr. Wood personally. Wood agreed to do the building.

Third: Between Equitable and Mr. Wood. He personally posted a bond guaranteeing the completion of the building;

Fourth: Between Equitable and Mr. Wood. He agreed to use his own money to finish the building if the loan was not sufficient to complete the building;

Fifth: Between Equitable and Mr. Wood. He was to receive from Equitable Ninety Thousand Dollars ($90,000.00) for the plans which he prepared to be used in construction;

Sixth: Between Equitable and three other parties to wit Woodmont Corporation. Mr. Wood and the new builder who was taking the project.

(3) Woodmont had purchased the land. Mr. Wood commenced to bui'd. The local union refused him manpower. Mr. Wood hired non union labor.

(4) The building reached over three stories high. The union with two to three hundred men invaded Mr. Wood's property and with hammers destroyed the building; beating his employees, sending some of them to the hospital, even rushed to kill him.

(5) Mr. Wood cleared the rubble and continued to work. Until this time Mr. Wood was using his own money to the extent of over a half million dollars.

(6) Equitable, after the union had raided the building, paid

Woodmont the first installment of One Hundred Thousand Dollars ($100,000.00) and a second installment in the sum of One Hundred and Twenty-three Thousand Dollars ($123,000.00). These payments were made upon the inspection and certification of Equitable Engineers, that the work was satisfactorily done, that the ration of construction and the balance of the loan was good and the balance was sufficient to complete the project. Mr. Wood continued to work and submitted his third requisition of One Hundred Thousand Dollars ($100,000.00). Again the engineers approved the work. Equitable refused the payment, and through its officers and agents represented to Mr. Wood that the union was blackmailing Equitable because it wrote accident and health insurance to union workers.

(7) Equitable sued the Woodmont Corporation in State Court for not completing the building. Mr. Wood was not made a party. An answer was filed denying the claim and accusing Equitable for holding the payments.

(8) During this period of waiting for trial, Equitable directed Mr. Wood to take a partner and then to fade away. This led to the settlement agreement which was signed by Equitable, the Woodmont Corporation, Mr. Wood and the New Builder.

(9) This settlement agreement basically provided:

(A) Woodmont would waive any defense in the foreclosure case in the State Court.

(B) Equitable would obtain noncontested judgment.

(C) Equitable would buy the property from the Sheriff.

(D) Equitable would sell the property to the cosigners for the same price.

(E) Equitable would transfer the loan at the same interest and conditions.

Equitable took the noncontested judgment, bought the property and refused to comply with the terms of the settlement agreement.

This created six separate causes of action.

The first cause was the foreclosure case in which Equitable obtained a Consent Judgment only against the Woodmont Corporation. This is not being disturbed in the other two pending cases.

The second cause is the contract between Wood and Equitable guaranteeing the completion of the building, and has nothing to do with the first one. Case No. C69-831.

The third cause is based on the settlement agreement between Woodmont Corporation and Equitable. This was in State Court. Upon the request of Equitable it was removed to the Federal Court and became Case No. C70-1139.

The rest of the causes of action are still afloat. They have never been adjudicated.

Equitable asked the consolidation of two and three, that is, C69-831 and C70-1139, and filed a motion for Declaratory Judgment. First on the ground of Res Judicata. Second, on the ground of loosing his personal law suits because he was a stockholder and officer in the corporation. The trial court sustained the motion. The Court of Appeals affirmed it.

VI. REASONS RELIED ON FOR ALLOWANCE OF WRIT

(A) Equitable stopped the payment of construction money for no other reason except accommodation for the Union to

send Wood back to Virginia in violation of Article IV, Section 2 of the United States Constitution.

"Full faith and credit shall be given each State."

(B) Equitable, aside of its contract to loan money to the Woodmont Corporation, signed other separate contracts with Mr. Wood:

(1) Agreed with him to be the builder.

(2) Mr. Wood personally guaranteed to complete the building.

(3) Agreed to pay him Ninety Thousand Dollars ($90,000.00) for building plans prepared.

The lower courts denied Mr. Wood the right to enforce his personal contracts because he was a stockholder and officer of the Corporation. This violated the Ohio State Constitution, Article 13, Section 3 which provides:

"In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her . . ."

(C) Res Judicata

We stated that Equitable agreed to loan the money to Woodmont Corporation, and separately entered into other personal contracts with Mr. Wood.

Equitable refused the payments and then brought a foreclosure action in the State Court against the Woodmont Corporation.

Before the case reached the trial list a settlement agreement was signed by:

Equitable
Woodmont Corporation
Paul A. Wood and a new builder

This was a complete contract and not an offer.

The substance of the contract was Equitable would take noncontested judgment, it would convey the property and would transfer the loan to the new builder. Wood then would leave to Virginia.

Equitable took the judgment, bought the property from the Sheriff and refused to comply with the provisions of the contract.

The Woodmont Corporation sued in the State Court to enforce the terms of the settlement contract. Mr. Wood sued in the Federal Court to enforce his personal contract with Equitable.

VII. CONCLUSION

(A) Therefore, the Constitution of the State of Ohio, Article II, Section 28, prohibits the doctrine of collateral estoppel.

(B) The Federal and State Constitutions cited, prohibit the doctrine of Res Judicata and since the cause of action on the settlement agreement did not exist until after the non-contested judgment was taken and Equitable failure to comply with the settlement. Hence the doctrine of Res Judicata could not be used.

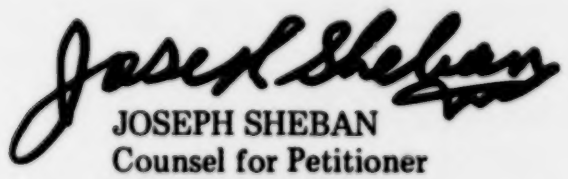
Wherefore the Petitioner Paul A. Wood prays that a Writ of Certiorari issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above entitled case.

Respectfully submitted,

JOSEPH SHEBAN
Counsel for Petitioner

CERTIFICATION

The undersigned, Joseph Sheban, Attorney for Petitioner, does hereby certify that a copy of this Petition was mailed to the Attorney for Respondent, Jules L. Markowitz, 15th Floor, Central National Bank Building, Cleveland, Ohio 44114, and a request was sent to the United States Court of Appeals for the Sixth Circuit to certify and docket this case in this Court.



JOSEPH SHEBAN
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5020 Sheban Drive
Youngstown, Ohio 44511
Telephone: (216) 788-8475

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Paul A. Wood, Et Al. Plaintiffs — vs — The Equitable Life Assurance Society of the United States Defendant	:	Civil Action Nos. C69-831 and C70-1139 Memorandum Opinion And Order
and Woodmont Apartment Corporation of Canton Plaintiffs — vs — The Equitable Life Assurance Society of the United States Defendant	:	

Battisti, C.J.

These actions are before the Court on defendant's motion for summary judgment. The bases for defendant's motion are twofold: that a prior state court action is res judicata; that no

material facts are in dispute and the defendant is entitled to judgment as a matter of law.

In 1965 Mr. Wood, a plaintiff in C69-831 formed an Ohio corporation for the purposes of constructing a high-rise apartment building in Canton, Ohio. The corporation (hereinafter referred to as Woodmont), is also a plaintiff in C69-831 and C70-1139. At all relevant times, Wood was the President and sole stockholder of Woodmont.

Financing of the project was provided by defendant Equitable. The following documents were executed by Woodmont and Equitable on March 4, 1965: (1) a building and loan agreement by which the defendant agreed to disburse $1,900,000.00 in periodic installments; (2) a promissory note for a like amount; (3) a mortgage deed relating to the property which was executed by Woodmont as the mortgagor to Equitable as the mortgagee.

After March 1965, the defendant disbursed $235,000.00 to Woodmont in two installments. No further funds were disbursed, however, as a result of claimed breaches of the building and loan agreement by Woodmont.

On June 29, 1967, Equitable brought a foreclosure action in the Stark County Common Pleas Court (Case No. 111,249). The judgment, entered on July 28, 1969, and to which the parties stipulated authenticity, provided:

(1) Woodmont was the owner of the property in question;

(2) Woodmont owned $235,000.00 plus interest on the note;

(3) A mortgage deed in favor of Equitable secured the note;

(4) Woodmont breached its duties under the mortgage and building and loan agreement.

This foreclosure proceeding is the prior proceeding between the parties which Equitable claims is determinative of the causes of action sought to be litigated in C69-831 and C70-1139.

In C69-831, filed October 16, 1969 and amended on June 5, 1970, both Wood and Woodmont allege that Equitable breached the building and loan agreement by its failure to continue the disbursal of the agreed amount of the loan. The amended complaint also alleges that Equitable breached a settlement which plaintiffs claim lead to a stipulated judgment in the Stark County foreclosure proceeding.

C70-1139 is an action by Woodmont against Equitable which was filed in state court on November 18, 1970 and which was removed to this Court on December 11, 1970. The causes of action sought to be litigated are identical to those alleged in C69-831.

The Stark County foreclosure action is res judicata on the issue of Equitable's alleged breach which is raised in C69-831 and C70-1139. See Norwood v. McDonald, 142 Ohio St. 299 (1943). In the prior state proceeding, it was determined that Woodmont breached the building and loan agreement, thus Equitable had no duty to continue to make the monetary disbursals under the contract. The prior action resolves the contention concerning Equitable's alleged breach.

As to the cause of action relating to the breach of an alleged settlement agreement, the uncontroverted and unchallenged exhibits submitted by the defendant clearly show that no settlement agreement was ever entered into between the parties. See Exhibits B, C, and D appended to Defendant's Reply Brief

in Support of Motion for Summary Judgment. Thus Equitable, in these two actions for breach of a contract of settlement, is entitled to judgment as a matter of law.

Defendant's Motion for Summary Judgment in both actions is hereby granted.

IT IS ORDERED.

Frank J. Battisti
Chief Judge

APPENDIX B

INTRODUCTION

The Court of Appeals in Cincinnati did not write an opinion. It just affirmed the judgment of the trial court by saying:

> ". . . the issues in the underlying litigation are clearly controlled by the doctrines of res judicata and collateral estoppel."

Equitable did not make Mr. Wood a party defendant in the foreclosure action. The corporation filed an answer denying a default.

Equitable argued in the trial court that Mr. Wood should have made himself a party defendant for its own convenience.

No. 75-1172

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Paul A. Wood, and Woodmont Corp., Plaintiffs-Appellants,	:	
vs.	:	ORDER
The Equitable Life Assurance Society of the United States, Defendant-Appellee.	:	

Before: EDWARDS, MILLER and ENGEL, Circuit Judges.

On receipt and consideration of an appeal in the above-styled case; and

Noting that the appeal appears to be subject to summary dismissal under Rules 3 (e) and 8 of the Rules of the United States Court of Appeals for the Sixth Circuit because the issues in the underlying litigation are clearly controlled by the doctrines of res judicata and collateral estoppel,

Now, therefore, for the reasons set forth above and further stated in the opinion entered in this cause by Chief Judge Frank Battisti,

Said appeal is hereby dismissed.

Entered by order of the Court

John P. Hehman, Clerk

APPENDIX C

INTRODUCTION

1. In the lower courts we refer to the following Appendix as the settlement agreement because Equitable called it such, in the last line of Paragraph 3.

2. Paragraph Number 1 of the settlement agreement provides for Mr. Wood and the Woodmont Corporation to waive the defenses in the foreclosure action in the State Court. The rest of the contract dealt with the mechanics of transferring the mortgage and the real property to the new builder.

3. The defense was waived and Equitable obtained an uncontested judgment and took the real estate. Immediately thereafter, Equitable wrote to Mr. Wood refusing to comply with the settlement agreement. The two cases which are before this Court do not attack the judgment in the foreclosure action in the State Court. One case deals with enforcing the signed settlement agreement and the other one deals with Mr. Wood's personal contract with Equitable.

4. The cause of action on this settlement arose only after the foreclosure judgment was taken and after Equitable had refused to comply with the terms of its settlement agreement.

5. Therefore applying the doctrine of Res Judicata in the lower courts violated Article I, Section 10 of the United States Constitution, and Article XI, Section 28 of the Ohio Constitution prohibiting the passing of retroactive laws.

This settlement contract on its face is the best evidence for conspiracy between Equitable and the union to send Mr. Wood to Virginia. Equitable was not gaining a penny to take the project from Mr. Wood. Furthermore, the conspiracy did not reach the lower echelon because upon discovery Mr. Wood

obtained documentation from the fieldmen reporting to the upper echelon that the completed part of the building was perfect and the balance of the mortgage money was enough to complete the building.

Hence, sending Mr. Wood to Virginia violated Article IV, Section 2 of the United States Constitution providing that full faith and credit shall be given to each State — etc.

■ ■ ■

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES
City Mortgage Department
1285 Avenue of the Americas, New York, N.Y. 10019

John P. Gloeckner, Vice President

July 21, 1969

Paul A. Wood, and
Woodmont Apartment Corporation
c/o Mr. Eugene I. Selker
1400 Leader Building
Cleveland, Ohio 44114

Re: B-11065—Woodmont Apartment Corporation
Premises: 1732 Market Avenue, N., Canton, Ohio

Dear Sirs:

The Equitable has agreed to accept Messrs. Marvin Zepkin and Frank Crisafi (the Builders) as owners and builders of the above captioned premises, subject however to the following terms and conditions to which you both shall agree:

1. Paul A. Wood ("Wood") shall immediately sign a stipulation of discontinuance with prejudice, with respect to the

Federal Court action, entitled Wood vs. Equitable, et al, said stipulation to be held in escrow by Eugene I. Selker, Esq. upon the following terms. You shall both immediately enter into, and deliver to our counsel for immediate filing, a stipulation or such other writing as our counsel may require, waiving any defense either of you may have in the existing foreclosure action by the Equitable.

2. Upon signature of the stipulations Equitable's City Mortgage Department will request authority of the Real Estate Committee of its Board of Directors to commit in good faith to make a loan in accordance with Equitable's usual lending standards and practices, at an interest rate of 6% per annum in an amount to be determined in the good faith discretion of Equitable but not to exceed $1,900,000. for a term of not more than 25 years, to be secured by a first mortgage based upon an appraisal by Equitable of the fee interest in the above captioned premises, such loan to be disbursed upon completion of the improvements and leasing to the satisfaction of the Equitable, no later than August 15, 1972. The closing of said loan shall be subject to the conditions hereinafter set forth. Said loan shall be made to the builders referred to above who shall purchase the premises from the Equitable not later than January 2, 1970, for a consideration equal to Equitable's Investment defined in Paragraph 4 (b) below, other than in clause (iv) thereof.

3. Upon issuance of a commitment to make the above loan, the aforesaid stipulation of discontinuation shall immediately be filed in the office of the Clerk of the U.S. District Court, Northern District of Ohio, Eastern Division. If such commitment is not issued on or prior to August 15, 1969, said stipulation shall be returned to Wood, and both parties shall be released from their respective obligations under the settlement agreement.

The following conditions shall be included in Equitable's commitment to make the aforesaid loan:

A. Wood shall deliver a deed to Equitable conveying fee simple absolute title to the premises, free and clear of all liens and encumbrances except conditions and restriction of record satisfactory to Equitable and current taxes and assessments not a lien and due and payable, together with a policy of title insurance of the Land Title Guarantee & Trust Co., insuring title in Equitable as aforesaid on or before the earlier of November 1, 1969, or five days before the date scheduled for the sale of the premises under said foreclosure action. Wood shall pay all costs and expenses incident to said transfer, including but not limited to Ohio transfer taxes, recording fees and the premium fee for the policy of title insurance.

B. The Builders shall complete construction upon the premises, on or before August 15, 1972, of a first-class high-rise apartment building, in compliance with all legal requirements and in accordance with complete architectural, structural and mechanical plans and specifications to be submitted to Equitable on or before December 1, 1969, and to be approved by Equitable, which approval shall not be unreasonably withheld or delayed, such approval, however, to impose no responsibilities on Equitable as to adequacy or legality.

C. Wood shall, simultaneously with the delivery of the deed pursuant to Paragraph A, submit evidence satisfactory to the Equitable that both Wood and Woodmont Apartment Corporation have divested themselves of all rights of operation and control in the premises for so long as Equitable may have an interest therein.

D. The aforesaid commitment shall also include additional terms and conditions as in the ordinary course of its lending

business are considered necessary and appropriate, and are included in its standard form of commitment letter.

4. In the event the Builders shall request on or before November 1, 1969, that the loan be a leasehold mortgage loan, the amount of said loan shall be the amount which would have been loaned pursuant to Paragraph 2, less the amount of Equitable's Investment defined in subparagraph (b), below, and Equitable and the Builders (or nominee satisfactory to Equitable) shall enter into a net lease no later than January 2, 1970, for a term of 50 years at a net annual basic rental computed as follows:

(a) During the first through the third lease year inclusive, in an amount equal to 4% per annum of Equitable's Investment payable monthly in advance, provided, however, that no rent shall be payable for the first six months of the term and, in lieu thereof, an amount equal to such six months rental payments shall be included in Equitable's Investment.

(b) Commencing with the fourth lease year through the end of the term of the lease, in an amount equal to 7% per annum of Equitable's Investment, payable monthly in advance.

Equitable's Investment is defined as the aggregate of the following:

(i) The sum of $235,000.00;

(ii) Accrued interest at the rate of 6% per annum thereon to the date of transfer of title to Equitable;

(iii) All fees, costs and disbursements to Equitable's local counsel with respect to both the foreclosure action, the Federal District Court suit and unpaid services with respect to the transactions provided for in this letter; and

(iv) The first six months deferred rental amount referred to above.

(c) The lease shall be in form and substance in all respects satisfactory to Equitable and shall contain:

(i) An option to the lessee to purchase the premises for a price consisting of Equitable's Investment as defined herein at any time during the term of the lease, with title to be transferred by quit-claim or special (not general) warranty deed at no cost to Equitable and without apportionments of any kind;

(ii) Obligate the tenant to complete construction upon the premises, on or before August 15, 1972, of a first-class high-rise apartment building, in compliance with all legal requirements and in accordance with complete architectural, structural and mechanical plans and specifications to be submitted to Equitable on or before December 1, 1969, and to be approved by Equitable, which approval shall not be unreasonably withheld or delayed, such approval, however, to impose no responsibilities on Equitable as to adequacy or legality; and

(iii) Contain provisions permitting the mortgaging of the lessee's leasehold estate and the assignment thereof without the consent of Equitable.

5. It is understood that at the time of filing of the aforesaid stipulation of discontinuance, Wood shall furnish to Equitable an Indemnity Agreement signed by Paul A. Wood, indemnifying Equitable against any final judgment and all costs and expenses arising out of any third party claim brought against Equitable arising out of the continuance of the action in the U.S. District Court against the building trades union named as a defendant therein. As security for said Indemnity Agreement Wood shall simultaneously therewith deliver to Equitable an assignment to it of any judgment obtained by Wood against said union.

It is further understood that upon signature of the settlement agreement, Wood shall immediately clear the above premises of

debris and clean same to the satisfaction of the municipal authorities of the City of Canton, Ohio.

If satisfactory to you, please sign a copy of this letter "Agreed to and Accepted", have the Builders indicate their receipt of a copy thereof, and return same to our counsel, Jules L. Markowitz, of Burke, Haber & Berick, together with the stipulations described in Paragraph 1, hereof, all within ten days from the date hereof. Upon his receipt thereof we shall proceed in accordance with the terms set forth. If such delivery is not made within such time, Equitable shall have the right to cancel its obligations hereunder by notice to you at the address above set forth.

Very truly yours,

Vice President

Agreed to and Accepted:

July 25, 1969

Paul A. Wood

Woodmont Apartment Corporation

By
President

Copy received, 1969

Supreme Court, U. S.
FILED
FEB 23 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975

No. 75-925

PAUL A. WOOD and WOODMONT APARTMENT CORPORATION OF CANTON,

Petitioners,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent.

BRIEF OF RESPONDENT THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

ROBERT B. HAAS
BURKE, HABER & BERICK
1500 Central National Bank Building
Cleveland, Ohio 44114

Attorney for Respondent
The Equitable Life Assurance
Society of the United States

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BRIEF OF RESPONDENT THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTORY STATEMENT

Respondent The Equitable Life Assurance Society of the United States ("Equitable") submits the within Brief in Opposition to the Petition for Writ of Certiorari (the "Petition") to the United States Court of Appeals for the Sixth Circuit submitted by Petitioners Paul A. Wood ("Wood") and Woodmont Apartment Corporation of Canton ("Woodmont"). As more fully set forth below, none of the considerations favoring review on certiorari, as set forth in Rule 19 of the Supreme Court Rules, exists in the instant case, nor does the Petition present any other special or compelling reason for such review.

The Petition purports to present six (6) separate questions for review. However, the questions presented include several self-evident propositions of law, to wit, Questions A, E and F.

The remaining three (3) questions presented essentially contend that the United States District Court for the Northern District of Ohio, Eastern Division (the "District Court"), and the Sixth Circuit Court of Appeals (the "Court of Appeals") improperly applied the doctrine of *res judicata* to the circumstances at bar.

Petitioners suggest in Section IV of their submission that the case involves provisions of the United States Constitution and the Constitution of the State of Ohio which do not bear even the remotest connection to the case at bar.

In view of the Petitioners' treatment of all questions presented in a single discussion and in further view of Respondent's dissatisfaction with the Statement of the Case set forth in the Petition, Respondent has adopted the approach of presenting its own Statement of the Case followed by an Argument directed at the two holdings of the District Court, as affirmed by the Court of Appeals, all as more fully set forth below.

II. STATEMENT OF THE CASE

A. Nature of the Action and Proceedings in the Courts Below

The proceedings in the District Court embraced two separate but related lawsuits: (1) Federal Civil Action No. C69-831, instituted in 1969 by Wood and Woodmont against Equitable; and (2) Federal Civil Action No. C70-1139, instituted in 1970 by Woodmont against Equitable, originally in the Court of Common Pleas for Stark County, Ohio (State Civil Action No. 115,176) and thereafter removed upon the petition of Equitable to the District Court, where the lawsuit was assigned Civil Action No. C70-1139.

In the "Amended Claim" filed by Wood and Woodmont in Civil Action No. C69-831, the plaintiffs alleged in essence as follows: (i) that Equitable on the one hand and Wood and Woodmont on the other had entered into a Building and Loan Agreement pursuant to which Equitable had agreed to finance the construction by Wood and Woodmont of an exclusive high-rise apartment development; (ii) that Equitable had breached its obligations under the Building and Loan Agreement by failing and refusing to disburse certain funds; (iii) that after refusing to comply with the Building and Loan Agreement, Equitable instituted a foreclosure action in Stark County Common Pleas Court and that thereafter all interested parties entered into a written agreement of settlement, resolving all their differences; (iv) that according to this settlement agreement, Woodmont agreed not to contest the foreclosure action and Equitable thereupon obtained its foreclosure judgment; and (v) that Equitable never observed its obligations under the settlement agreement and therefore obtained its foreclosure judgment by virtue of fraud upon Woodmont.

Equitable's Answer to the Amended Claim in Civil Action No. C69-831 raised the affirmative defense of *res judicata*, based on the Stark County foreclosure action.

In the "Claim" filed in Federal Action C70-1139, Woodmont alleged the same causes of action described above. Equitable's Answer to this Claim also raised the affirmative defense of *res judicata*.

In May of 1973, pursuant to the Motion of Equitable, The Honorable Thomas D. Lambros, United States District Judge, ordered a consolidation of Civil Action Nos. C69-831 and C70-1139.

In January of 1974, Equitable filed a Motion for Summary Judgment in the consolidated actions, *inter alia* upon the ground that the causes of action alleged in both Federal actions were barred by the doctrine of *res judicata*.

On September 26, 1974, The Honorable Frank J. Battisti filed the District Court's Memorandum Opinion and Order (set forth in the Petition at 1a-4a), granting Equitable's Motion. Judge Battisti found that the causes of action alleged in the two consolidated cases were identical, namely one for breach of the Building and Loan Agreement and a second for breach of the alleged settlement agreement. The District Court held not only that the doctrine of *res judicata* applied as a bar to the pending actions, but also that, "As to the cause of action relating to the breach of an alleged settlement agreement, the uncontroverted and unchallenged exhibits submitted by [Equitable] clearly show that no settlement agreement was ever entered into between the parties." (District Court Memorandum Opinion and Order, set forth in the Petition at 3a).

Wood and Woodmont appealed to the Sixth Circuit Court of Appeals. By Order dated October 3, 1975, the Court of Appeals, noting that the appeal appeared to be subject to summary dismissal pursuant to Rules 3(e) and 8 of the Rules of the United States Court of Appeals for the Sixth Circuit, unanimously dismissed the appeal. The Court of Appeals, referring specifically to Chief Judge Battisti's District Court Opinion, stated that, ". . . the issues in the underlying litigation are clearly controlled by the doctrines of res judicata and collateral estoppel." (Order of the Court of Appeals, set forth in the Petition at 2b). Thereafter, Wood and Woodmont filed a "Motion for Reconsideration" which the Clerk of the Court of Appeals, by correspondence dated November 5, 1975, refused to accept for filing since it was untimely tendered.

B. Statement of the Facts

1. *The Woodmont Apartment Development*

Prior to March of 1965, Wood formed Woodmont to acquire title to certain real property located at 1732 Market Avenue North in Canton, Ohio. Wood was at all relevant times the President and sole owner of all capital stock of Woodmont.

After acquisition of title to the real estate, Woodmont arranged financing with Equitable for the construction of an exclusive high-rise apartment development. On March 4, 1965, the following documents were executed between Woodmont and Equitable: (1) A Building and Loan Agreement; (2) A Promissory Note in the amount of One Million Nine Hundred Thousand Dollars ($1,900,000) executed by Woodmont in favor of Equitable (the "Promissory Note"); and (3) A Mortgage Deed executed by Woodmont as Mortgagor.

In the months which followed, Equitable disbursed to Woodmont in two installments a total of Two Hundred and Thirty-Five Thousand Dollars ($235,000). No further sums were disbursed by Equitable, however, due to certain breaches by Woodmont of the terms and conditions of the Building and Loan Agreement. Thereafter, construction work on the Canton property remained idle up to and including the date on which Equitable instituted foreclosure proceedings against Woodmont.

2. *The Stark County Foreclosure Action*

On June 29, 1967, Equitable filed a "Petition for Money Judgment, Foreclosure and Other Equitable Relief" in Stark County, Ohio Common Pleas Court (Case No. 111,249, referred to herein as "the Stark County foreclosure action") against Woodmont, et al. The Petition filed

by Equitable alleged that Woodmont had committed various breaches of the Building and Loan Agreement, was in default on the Promissory Note, and that there was due and owing thereunder the sum of Two Hundred and Thirty-five Thousand Dollars ($235,000). Equitable prayed, *inter alia,* for a money judgment in that amount and for foreclosure on the Mortgage.

In its Answer, Woodmont averred that Equitable had breached the terms of the Building and Loan Agreement to Woodmont's detriment and loss.

During the pendency of the Stark County foreclosure action, counsel for Wood and Woodmont and counsel for Equitable exchanged correspondence dated July 21, July 25, and August 5, 1969, in an effort to resolve the differences between the parties; however, no accord was ever reached.

The foreclosure action came on for hearing before The Honorable William R. Quinn on July 28, 1969, and by Journal Entry dated the same day, the Court found that:

> (i) Woodmont owed Equitable under the Promissory Note the sum of Two Hundred and Thirty-five Thousand Dollars ($235,000); and
>
> (ii) Woodmont breached its obligations under the Mortgage and the Building and Loan Agreement and that by reason thereof the Mortgage had been breached and had become absolute.

On September 17, 1969, Woodmont filed a Petition to Vacate the Judgment and also an amended Answer and Cross Petition. The Petition to Vacate Judgment alleged in relevant part as follows:

> (i) That the same cause of action involving the same parties and the same claims was already pending in Federal Court in Cleveland;

> (ii) That Equitable breached its Building and Loan Agreement with Woodmont;
>
> (iii) That while the Stark County foreclosure action and the Federal Court proceeding were pending, Equitable and Woodmont entered into a settlement agreement pursuant to which Woodmont consented not to contest the Stark County foreclosure action, and that Equitable thereby obtained its foreclosure judgment by a fraud perpetrated upon Woodmont and upon the Court.

Woodmont prayed for an order vacating the foreclosure judgment, for a temporary injunction suspending the Order of Sale of the premises and for leave to file its Amended Answer and Cross Petition. The Amended Answer and Cross Petition merely alleged in essence that Equitable had breached the Building and Loan Agreement and that the same cause of action was pending in Federal Court in Cleveland.

Woodmont's Petition to Vacate was heard on September 25, 1969 in Stark County Common Pleas Court. In accordance with the Journal Entry of September 29, 1969, the Court decreed that the Petition to Vacate, the request for a temporary injunction suspending the Order of Sale and the request for leave to file the Amended Answer and Cross Petition were all overruled.

Woodmont appealed from this order to the Court of Appeals for the Fifth District, Stark County, Ohio. The Court of Appeals, in a Memorandum Opinion dated October 9, 1970, unanimously affirmed the Common Pleas Court in the following language:

> "Coming now to the order appealed from, we have made careful examination of the Bill of Exceptions and find no error prejudicial to the appellant. Fraud was pleaded but not proven, although opportunity was afforded." (Memorandum Decision of the

Stark County, Ohio Court of Appeals, attached as Exhibit 10 to the Affidavit of Jules L. Markowitz submitted in support of the Motion for Summary Judgment in the District Court).

III. ARGUMENT

A. The District Court and Court of Appeals Correctly Applied the Doctrines of *Res Judicata* and Collateral Estoppel to the Claims at Bar.

A comparison of the causes of actions set forth in Federal Civil Action Nos. C69-831 and C70-1139 with the proceedings in the Stark County foreclosure action clearly establishes that all causes of action and claims for relief in the Federal actions are barred by the doctrine of *res judicata*.

The prerequisites to the application of the doctrine of *res judicata* are: (1) that there has been a prior adjudication by a court of competent jurisdiction; (2) that the prior adjudication has become final; (3) that the prior adjudication has been on the merits; (4) that the prior adjudication involved the same parties *or persons in privity therewith;* (5) that the prior adjudication involved the same subject matter or cause of action. See, *e.g., Schroeder v. 171.14 Acres of Land,* 318 F. 2d 311 (8th Cir. 1963), and authorities cited therein.

Upon review, it is clear that the Stark County foreclosure action satisfies all of the above prerequisites vis-a-vis the within Federal actions, and thus that the Courts below were correct in holding that the Stark County lawsuit poses an absolute bar to the prosecution of the claims set forth in Civil Action Nos. C69-831 and C70-1139.

First of all, there can be no question that the Stark County Common Pleas Court (and, accordingly, the Court of Appeals for the Fifth District, Stark County, Ohio) were courts of jurisdiction competent to adjudicate the causes of

action and claims for relief pending before them. The doctrine of *res judicata* applies regardless of whether the prior adjudication is rendered by the same court in which the subsequent action is pending or by a court of independent or concurrent jurisdiction. See, *e.g., Schroeder v. 171.14 Acres of Land,* cited *supra.*

Secondly and thirdly, it is beyond question that the judgment in the Stark County foreclosure action was both final and on the merits. As to finality, it is the law of *res judicata* that the prior judgment has obtained the requisite finality after expiration of the appeal time without an appeal having been taken, or after the judgment has been affirmed on appeal, or after an appeal which has been taken is dismissed. *Epstein v. Chatham Park, Inc.,* 52 Del. 56, 153 A. 2d 180 (1959). In the Stark County foreclosure action, an appeal from the Common Pleas Court's refusal to vacate its judgment or suspend the order of sale was taken to Fifth District Court of Appeals, Stark County, Ohio, which unanimously affirmed the Common Pleas Court. As to the third prerequisite, the two Journal Entries in the Stark County Common Pleas Court (attached as Exhibits 6 and 9 to the Affidavit of Jules L. Markowitz in support of the Motion for Summary Judgment in the District Court) and the Memorandum Decision of the Stark County Court of Appeals (Exhibit 10 to such Affidavit) leave no doubt that the prior adjudication was "on the merits".

Fourthly, the persons or parties between whom the prior judgment is to operate as *res judicata* must be the same as the parties involved in that prior adjudication *or persons in privity therewith.* The pleadings in the relevant lawsuits disclose that: (1) Woodmont, the only Plaintiff in Civil Action No. C70-1139 and one of the two Plaintiffs in Civil Action No. C69-831, was a party to the Stark County foreclosure action; and (2) Equitable, the only

Defendant in both Federal actions, was also a party to the Stark County foreclosure action.

Although Paul A. Wood individually, a Plaintiff in Federal Civil Action No. C69-831, was not a formal named litigant in the Stark County foreclosure action, he clearly was in privity with Woodmont, a defendant to that action. The uncontroverted evidence adduced in the District Court in support of Equitable's Motion for Summary Judgment clearly shows that Wood's relationship with Woodmont was at all relevant times that of President and sole shareholder and assignee of any and all choses in action Woodmont had against Equitable. In his capacity as sole stockholder in Woodmont, Wood is considered a person "in privity with" a party to the prior adjudication, since a judgment against a corporation is binding and conclusive in a subsequent action by or against its stockholders, even though the stockholders are not served or joined in the prior action in their individual capacities. See, *e.g.*, *Marin v. Augedahl*, 247 U.S. 142 (1918). In all matters within the ambit of their corporate powers, the officers of a corporation represent their shareholders and, accordingly, in the eyes of the law, the shareholder is privy to adjudications involving the corporation. See, *e.g.*, *Estate of Egan v. Commissioner of Internal Revenue*, 260 F. 2d 779 (8th Cir. 1958), and cases cited therein.

In his capacity as assignee from Woodmont of its choses in action against Equitable, Wood would similarly be concluded by the Stark County foreclosure action, for the prior adjudication not only binds named parties but also those persons who subsequently acquire an interest in the adjudicated subject matter, whether by inheritance, succession, purchase or assignment. See *e.g.*, *Lamb v. Cramer*, 285 U.S. 217 (1932).

Finally, the fact that Wood contracted to be a personal guarantor of Woodmont's obligations to Equitable

under the Building and Loan Agreement does not clothe him with an immunity from the Stark County foreclosure judgment. Regardless of what capacity Wood purports to be suing in and what relationship Wood bears to Woodmont, Wood would nevertheless be concluded by the Stark County foreclosure action since, for purposes of the defense of *res judicata*, the binding effect of the prior judgment extends not only to persons who are *in form* named parties but also to persons who, *by virtue of their direct interest in the subject matter previously adjudicated and their ability to control the prior proceedings*, defend, examine witnesses and appeal from a judgment rendered therein, are *in substance* identifiable with a named litigant. *Bernhard v. Bank of America National Trust & Savings Association*, 19 Cal. 2d 807, 122 P. 2d 892 (1942). Again, the uncontroverted evidence in the District Court established that Paul A. Wood enjoyed such a "controlling person" status in the Stark County foreclosure action.

As to the fifth prerequisite for the application of *res judicata*, a comparison of the Federal causes of action with the Stark County foreclosure action reveals that all Federal causes of action have been previously adjudicated. In this regard, the District Court, after an examination of the two Federal actions, concluded that, "The causes of action sought to be litigated [in C70-1139] are *identical* to those alleged in C69-831." (District Court Memorandum Opinion and Order, set forth in the Petition at 3a) (emphasis added). In both Federal actions (C69-831 and C70-1139), one cause of action is based upon the allegation that Equitable committed breaches of the Building and Loan Agreement with Woodmont. This exact cause of action was clearly set forth as a defense in the Answer filed by Woodmont in the Stark County foreclosure action.

The law of *res judicata* provides that a subsequent independent action for affirmative relief is barred by a prior adjudication in which the subject matter forming the

underlying basis for the claim was interposed as a defense. See, *e.g., Watson v. Goldsmith,* 205 S.C. 215, 31 S.E. 2d 317 (1944). This rule applies where, as in the Stark County foreclosure action, the subject matter which was framed as a defense could also have been asserted as a counterclaim for affirmative relief. *Leslie v. Mollica,* 236 Mich. 610, 211 N.W. 267 (1926). In this regard, the District Court expressly found that the issue of Equitable's alleged breach of the Building and Loan Agreement was clearly litigated in the Stark County foreclosure action:

> "The Stark County foreclosure action is *res judicata* on the issue of Equitable's alleged breach which is raised in C69-831 and C70-1139. See *Norwood v. McDonald,* 142 Ohio St. 299 (1943). In the prior state proceeding, it was determined that Woodmont breached the building and loan agreement, thus Equitable had no duty to continue to make the monetary disbursals under the contract. The prior action resolves the contention concerning Equitable's alleged breach." (District Court Memorandum Opinion and Order, set forth in the Petition at 3a).

B. The Courts Below Correctly Found That As a Matter of Law, No Settlement Agreement Had Ever Been Reached.

The only evidence introduced before the District Court with respect to Wood and Woodmont's claim in both Federal Actions that Equitable had breached the terms of an alleged settlement consisted of three (3) letters exchanged between counsel for Wood and Woodmont and counsel for Equitable. (Exhibits B, C, and D to the Supplemental Affidavit of Jules L. Markowitz filed in the District Court).

That correspondence clearly establishes as a matter of law and without any dispute of fact that no settlement accord was ever reached. The first letter from Equitable dated July 21, 1969 (Exhibit B to the Supplemental Affidavit of Jules L. Markowitz, set forth in the Petition at 2c-7c) constituted a *proposed* settlement accord. Although Wood and Woodmont executed a copy of this July 21 letter under the designation "Agreed to and Accepted," their execution was expressly conditioned upon certain proposed changes contained in their July 25, 1969 correspondence (Exhibit C to the Supplemental Affidavit of Jules L. Markowitz filed in the District Court):

> ". . . Thus, it is my understanding that your intentions as set forth in your letter of July 21, 1969 should also include the following which I shall deem part of the conditions of that letter." [several conditions thereinafter set forth]
>
> . . .
>
> "I have obtained the approval and signatures of both Wood and the Builders to both *your letter and this letter which shall be construed together* as an acceptance and approval. Please advise that your understanding is the same as set forth herein." (emphasis added).

In its letter of August 5, 1969 (Exhibit D to the Supplemental Affidavit of Jules L. Markowitz filed in the District Court), *Equitable unequivocally rejected this counter-offer*:

> "This is to advise that Equitable is unwilling to agree to the changes in the terms of settlement or to the additional provisions as set forth in your letter of July 25, 1969.
>
> "Therefore, you are hereby notified, as provided in the last paragraph of our said letter of July 21, 1969, that the Equitable hereby cancels any further obligations on its part under the terms thereof, and declares said letter to be of no further force or effect."

As succinctly stated by the District Court, "[T]he uncontroverted and unchallenged exhibits submitted by [Equitable] clearly show that no settlement agreement was

After consideration of the evidence and the written and oral arguments of counsel, the Stark County Court of Appeals affirmed the Common Pleas Court's overruling of the Petition to Vacate, and expressly found that as to the cause of action for breach of the alleged settlement agreement, the proof simply failed:

> "Coming now to the order appealed from, we have made careful examination of the Bill of Exceptions and find no error prejudicial to the Appellant. *Fraud was pleaded but not proven, although opportunity was afforded.*" (Exhibit 10 to the Affidavit of Jules L. Markowitz submitted in the District Court) (emphasis added).

In brief, in addition to the fact that the causes of action for breach of the alleged settlement agreement fail as a matter of law, such claims for relief in the District Court were barred by the doctrines of *res judicata* and collateral estoppel.

CONCLUSION

Since Petitioners have failed to present any special or compelling reasons for review of the Court of Appeals decision, the request for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel, a member of the bar of the United States Supreme Court, hereby certifies that, in compliance with Rule 33 of the Supreme Court Rules, three (3) printed copies of the foregoing Brief of Respondent The Equitable Life Assurance Society of The United States in Opposition to the Petition for Writ of Certiorari were deposited in the United States mail on this 24th day of February, 1976, with first class postage prepaid, addressed to Joseph Sheban, Esquire, 5020 Sheban Drive, Youngstown, Ohio 44511, counsel of record for the Petitioners.

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